Decision 05-09-046 September 22, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Rehearing of Resolution G-3372.	Application 05-02-022

ORDER MODIFYING RESOLUTION G-3372 AND DENYING REHEARING OF RESOLUTION, AS MODIFIED

I. INTRODUCTION

PG&E filed Advice Letter 2581-G/2568-E (dated October 15, 2004) ("Advice Letter" or "AL") in which it proposed to expand Rule 17.1 to add the following language:

> "Billing error shall also include failure to issue a gas, electric or combined commodity bill, actual or estimated, in a timely manner in accordance with Rule 9.A.
>
> Failure to issue a bill due to causes beyond the reasonable control of PG&E, including inaccessible roads, the customer, . . . preventing access to PG&E's facilities . . . or other causes within the reasonable control of the customer, shall not be considered "billing error" for purposes of this Rule."

PG&E's Advice Letter also proposed to modify gas Rule 17.2 section A.5 and electric Rule 17.2 section A.6 regarding adjustment for unauthorized use, and to add Rule 17.3 to cover situations that were not covered in Rules 17.1 or 17.2. (Advice Letter, pp. 2 & 3.)

The advice letter said the changes to Rule 17.1, "will result in residential customers having a three-month limitation placed on their back bill exposure for services provided by PG&E in most instances." (Advice Letter, p. 2.) The advice letter also proposed that the modified language be made effective as of October 13, 2004. (Advice Letter, p. 2.)

The Utility Reform Network (TURN) filed a protest to the advice letter on November 4, 2004, urging the Commission to reject the advice letter and initiate a formal investigation into PG&E's billing and collection practices. Because the advice letter proposed to establish October 13, 2004 as the effective date for the modified definition, TURN characterized the advice letter as "a transparent effort by the utility to stem its exposure for practices that are inconsistent with the rules as they exist today." (TURN's Protest to PG&E Advice Letter 2581-G/2568-E ("TURN Protest"), p. 2.) TURN argued that the pre-existing Rule 17.1 already encompassed failure to "produce an accurate and timely bill" in its definition of billing error. (TURN Protest, p. 3.) TURN also advocated that the Commission find that extended reliance on estimated bills constitutes a billing error under the pre-existing Rule 17.1, and recommended including that statement in any modification to Rule 17.1. (TURN Protest, p. 4.)

On November 9, 2004 TURN filed a motion in PG&E's 2003 general rate case ("GRC"), Application (A.) 02-11-017, seeking investigation into PG&E's billing and collection practices. The Assigned Commissioner in the GRC granted TURN's motion on February 25, 2005, consolidating the investigation with Investigation (I.) 03-01-012, a companion investigation with the GRC. (*Assigned Commissioner's Ruling Granting the Utility Reform Network Motion for an Investigation into Pacific Gas and Electric Company's Billing and Collection Practices* ("February 25 ACR"), filed February 25, 2005, pp. 1-2.)

We issued Resolution G-3372 ("Resolution"), dated January 13, 2005, in response to the PG&E advice letter, but not the motion. In the Resolution, we granted some proposals recommended by PG&E and by TURN in its protest to the

advice letter, we modified some and denied others. In ruling on the advice letter proposals, the Resolution interpreted the existing tariff and adopted clarifying language consistent with existing Commission policy.

Specifically, the Resolution approved and modified tariff language regarding the definition of "billing error" and the use of PG&E service without compensation. The Resolution specified as billing error, failure to issue bills and estimated bills and failure to issue a bill or estimating a bill due to changes to a billing system. (See Resolution G-3372, p. 24 [Findings of Fact No. ("FOF") 3, 4 & 6].) The Resolution adopted other clarifying language, to articulate what it refers to as "the proper interpretation of existing tariffs." (Resolution G-3372, p. 16.) The Commission observed that the outcome is consistent with, "existing CPUC policy, tariffs, and requirements, including the requirements of D.86-06-035." (Resolution G-3372, see for example, pp. 9 and 24.)

PG&E timely filed an application for rehearing of the Resolution. In summary, PG&E claims the following errors: (1) "the Commission errs by finding that its "newly adopted" definition of billing error is consistent with existing CPUC policy, tariffs and requirements, including the requirements of D.86-06-035," (2) "the Resolution's findings also improperly disregard the Commission staff's express prior guidance in interpreting those tariffs,…" and (3) "… by finding that its newly-adopted definition of billing error is consistent with the existing tariff, Resolution G-3372 could be construed to imply retroactive effect to the Commission's new definition, . . ."[1] (Rehearing Application, pp. 1 – 2.)

TURN filed a Response to the Rehearing Application urging the Commission to deny PG&E's application, "because the definition of 'billing error'

[1] On the allegation of retroactive effect, PG&E states that its concern is not with prospective application of the Resolution, but with these findings about consistency. (Rehearing Application, pp. 4 & 10.)

in Resolution G-3372 is wholly consistent with Commission policy, tariffs and requirements and because PG&E's due process and retroactivity concerns are unfounded." (TURN Rehearing Response, p. 2.)

We have reviewed each and every allegation set forth in the application for rehearing and are of the opinion that PG&E has not demonstrated grounds for granting rehearing. However, we note that the Resolution should be modified to clarify our statements regarding consistency with existing policy and tariffs; to adhere more consistently to the Advice Letter's proposed language, "failure to issue" bills; and to remove unnecessary factual statements that may prove confusing. Accordingly, we deny PG&E's application for rehearing of the Resolution, as modified.

II. DISCUSSION

A. The Resolution is consistent with D.86-06-035.

Although characterized by PG&E as newly adopted, the tariff language adopted in Resolution G-3372 is consistent with long-standing Commission policy. In *Re: Retroactive Billing by Gas and Electric Utilities to correct Alleged Meter Underbillings Due to Meter Error and Meter Fraud* ("*Retroactive Billing Decision*") [D.86-06-035] (1986) 21 Cal P.U.C.2d 270, the Commission established for gas and electric utilities a limitation of three months on retroactive billing of residential customers for billing and meter errors. That decision says, "[w]e believe a three-month limitation period for backbilling residential customers is sufficient in view of the utilities' assertion that they have procedures to detect billing and meter errors promptly." (*Id.* at p. 278.) D.86-06-035 adopted model rules and directed the utilities to conform to them. D.86-06-035 is referenced throughout the Resolution and in the pleadings involving the rehearing application.

PG&E selectively cites language from D.86-06-035 and characterizes the decision as standing "for the principle that customers that use energy should

pay for that energy." (Rehearing Application, p. 14-15.) Ultimately, PG&E fails to mention the decision's language, quoted above, that directly addresses limiting the backbilling of residential customers for billing error. Presumably, PG&E is aware of the holding because its tariff Rule 17.1(B) 2 (a) conforms to the decision, and states as follows:

> "2. BILLING ERRORS RESULTING IN UNDERCHARGES TO THE CUSTOMER
>
> a. RESIDENTIAL SERVICE
>
> If a residential service is found to have been undercharged due to a billing error, PG&E may bill the Customer for the amount of the undercharge for a period of three months. However, if it is known that the period of billing error was less than three months, the undercharge will be calculated for only those months during which the billing error occurred."

D.86-06-035 does not adopt or directly discuss a definition of "billing error." It does not adopt definitions of terms, but directs the utilities to draft tariffs in conformance with the decision. (*Retroactive Billing Decision*, *supra*, 21 Cal P.U.C.2d at p. 278.) D.86-06-035 does not create exceptions or authorize utilities to create exceptions to the three-month limit for retroactive billing of residential customers for billing errors. The Resolution's interpretation of PG&E's pre-Resolution tariff language and the revised tariff language it adopts are consistent with the requirements of D.86-06-035.

B. The Resolution is consistent with pre-existing tariff language.

PG&E claims that Resolution G-3372 errs by including "delayed" and "estimated" bills within the definition of "billing error" and finding the interpretation to be "consistent with existing. . . tariffs." (Rehearing Application, p.4.) PG&E says that the previous Rule 17.1 "made no mention of delayed or estimated bills; only 'incorrect' bills fell within rule 17.1's definition of billing

error." (In fact, the term "delayed" bill was neither proposed nor adopted for the revised tariff language.)[2] The definition of billing error in pre-Resolution electric Rule 17.1(A) was:

> "A. BILLING ERROR DEFINED
>
> Billing error is the incorrect billing of an account due to an error by PG&E, the energy service provider (ESP), or its agents, or the Customer which results in incorrect charges to the Customer. Billing error includes, but is not limited to, incorrect meter reads or clerical errors, wrong daily billing factor, incorrect voltage discount, wrong connected load information, crossed meters, an incorrect billing calculation, an incorrect meter multiplier, an inapplicable rate, or PG&E's and/or the ESP's failure to provide the Customer with notice of rate options in accordance with Rule 12. Billing error shall also include errors or failures of PG&E, an Energy Service Provider (ESP), or its agent, to properly edit and validate meter data into bill quality data pursuant to meter data processing standards and protocols adopted by the Commission.
>
> Field error, including, but not limited to, installing the meter incorrectly and failure to close the meter potential or test switches, is also considered billing error.
>
> Billing error which does not entitle the Customer to a credit adjustment includes failure of the Customer to notify PG&E of changes in the Customer's connected

[2] PG&E bases much of its tariff interpretation argument on the meaning of the word "delayed" and its absence from the previous Rule 17.1 language. This emphasis is misleading because "delayed" is not in either the proposed or adopted tariff language. PG&E's Advice Letter proposes to add language to Rule 17.1 saying, "[b]illing error shall also include failure to issue a gas, electric or combined commodity bill, actual or estimated, in a timely manner in accordance with Rule 9.A." (Advice Letter 2581-G 2568-E, October 15, 2004, p. 3.) The Advice Letter also uses the phrase, "failure to deliver," but does not actually propose its adoption. (Advice Letter, p. 1 and Appendix 1, Rule 17.1. (A).) Those two phrases, as well as the word "delayed," have been used in pleadings and correspondence apparently interchangeably. In our revised Resolution we will adopt consistent use of the phrase "failure to issue" in order to avoid possible confusion.

> load, equipment or operation or failure of the Customer to take advantage of any noticed rate option or condition of service for which the Customer becomes eligible subsequent to the date of application for service."

(Electric and Gas Rules17.1, as they existed before Resolution G-3372, appear in the Resolution at pp. 4 and 3, respectively.)[3]

PG&E references dictionary definitions to support its interpretation, but in doing so, introduces two inappropriate substitutions. First, Rule 17.1(A), set out above, defines "billing error" as "the incorrect billing of an account due to an error. . . which results in incorrect charges to the Customer." Yet, PG&E adopts the phrase "incorrect bill" and uses that phrase as the basis for its interpretation argument. (Rehearing Application, p. 5.) In fact, "incorrect bill" does not appear in the rule.

Substituting "incorrect bill" for the actual tariff language supports PG&E's unreasonable interpretation argument that there cannot be a billing error unless there has been a bill. PG&E says, "[a] bill that is delayed or estimated is not an "incorrect" bill under prior Rule 17.1," and further, "a reasonable, common-sense interpretation of prior Rule 17.1 would be that a billing error occurs when a bill has been issued but is later found to contain incorrect charges." (Rehearing Application, p. *5*.) Considering a correct or incorrect <u>bill</u>, rather than correct or incorrect billing of an account or correct or incorrect charges to the customer, distorts the analysis of the tariff language. This extremely narrow definition of billing error is neither a reasonable nor a common-sense regulatory interpretation.

Second, PG&E compares the dictionary definitions of, "delay," "estimate" and "incorrect," referring to "incorrect" in the phrase, "incorrect bill," rather than in the Rule 17.1(A) phrases, "incorrect billing of an account and

[3] The definition of billing error in the gas tariff is effectively the same as the electric.

"incorrect charges to the customer." (Rehearing Application, p. 5.) PG&E is off the mark in basing its argument on the definition of the word "delay" and comparing it to the definition of the word "incorrect" to show an error in the Resolution's interpretation of Rule 17.1(A.) The word "delay" does not appear in either the previous tariff language or in the proposed and adopted revision to Rule 17.1(A.) The Resolution adopts language from the advice letter,

> "Billing error shall also include failure to deliver[4] a gas, electric, or combined commodity bill, actual or estimated, in a timely manner in accordance with Rule 9A."

(Resolution, p. 9.) Thus, PG&E's analysis and comparison of the words "incorrect bill" and "delay" introduce word substitutions that render the argument essentially meaningless.

The Commission addresses tariff interpretation in a 2003 decision in a complaint proceeding. (*Zacky and Sons v. Southern California Edison Co.*, [D.03-04-058, p. 19 [Conclusions of Law ("COL") 1 – 7] (slip op.)] (2003) ___ Cal.P.U.C.3d ___.) In D.03-04-058 the Commission considers whether Southern California Edison's tariff definitions permit a poultry processing facility to be billed at an agricultural rate. (*Id.* at p.1 (slip op.).) The decision adopts principles for the interpretation of tariffs that are applicable to the instant analysis. Tariff interpretation requires giving words their ordinary meanings, avoiding interpretations that make any language surplus, and interpreting words in context in a reasonable, common sense manner. (Id. at p. 19 [COL 2 & 3] (slip op.).)

As noted by PG&E, the ordinary meaning of the word "incorrect" is "not correct." (Rehearing Application, p. 5.) The ordinary and common-sense way to understand which terms should be included within the definition of "billing

[4] For internal consistency and consistency with the Advice Letter proposal, we will adopt the phrase, "failure to issue" instead of "failure to deliver" in the revised Resolution, which is attached as Appendix A. (See footnote 2, *supra*.)

error" would be to identify actions or situations that cannot be considered, "correct billing of the account." For example, if PG&E does not issue a timely bill reflecting the correct charges, then the billing for that account is not correct. It is incorrect billing of the account resulting in incorrect charges to the customer and, therefore, a billing error. Similarly, an estimated bill cannot be considered correct billing of an account because the bill is only an estimate or "an approximate judgment or calculation." (See PG&E's definitions, Rehearing Application, p. 5.) Therefore, by definition, an estimated bill is not correct. An estimate is incorrect billing of the account resulting in incorrect charges to the customer and must be considered a billing error.[5] Again, PG&E's argument that "billing error" only occurs when a bill has been sent and is later found to be incorrect is not reasonable.

Surprisingly, in its interpretation argument PG&E addresses only the first sentence of the billing error definition in pre-Resolution Rule 17.1(A). (Rehearing Application, pp. 4-6.) However, in interpreting the definition in Rule 17.1(A), the first sentence must be considered in the context of the entire definition in order to avoid an interpretation that makes much of the language surplus. (D.03-04-058, p. 19, COL 2 (slip op.).) The subsequent sentences in Rule 17.1(A) help explain the first sentence, saying specifically, "[b]illing error includes, but is not limited to, ..." The examples that follow provide a non-exclusive list of the types of problems that constitute billing error. (See Rule 17.1(A) above.) Again, PG&E correctly notes that the terms "delay" and "estimate" are not included in the actual language of the pre-resolution Rule

[5] PG&E also argues that while incorrect bills may be misleading to a customer, no bill at all or a bill identified as an estimate is not misleading because the "customer is aware there is a degree of uncertainty surrounding the bill." Therefore the customer can call PG&E for clarification and "plan for future costs accordingly." (Rehearing Application, p. 7.) While this argument offers a perspective on billing problems, it does not help with interpreting the plain language of the rule.

17.1(A) definition.[6] (Rehearing Application, p. 5; see also, discussion, *supra*, of the term "delay.") However, the obvious purpose of the list of examples is to help determine whether other situations that arise would logically be included in the billing error definition that the examples illustrate. Failure to issue a bill and issuing an estimated bill reasonably fall within the types of problems identified in the examples.

Regarding failure to issue a bill, TURN observes that:

> "Once the whole definition is considered, the illogic of PG&E's reading becomes clear – under the utility's approach, if it incorrectly reads the meter, that would be billing error, but if it fails to read a meter at all, that might not be. And if it incorrectly calculates the bill, that's billing error, but the failure to calculate a bill at all might not be. PG&E construes the words "incorrect billing" and "incorrect charges" so narrowly as to obscure the obvious: that a correct charge would be a charge commensurate with usage (and the appropriate rate) for the regular interval at which PG&E is required to bill. Accordingly, when a customer is not charged for their usage, they are indeed 'incorrectly billed.'"

(TURN Rehearing Response, p. 5.)

[6] In its interpretation argument PG&E also states, "the fact that Rule 17.1 did not mention estimated bills – even though other provisions of PG&E's tariffs expressly authorized bill estimation (see, e.g., Rules 9.C, 17.B.5) demonstrates **a deliberate choice** not to include estimated bills in the definition of billing error." (Rehearing Application, p. 5, emphasis added.) The purpose of this argument is not clear. PG&E may be arguing that if "estimated" bills are permitted, then they constitute exceptions to the three-month limit on retroactive residential billing even though such an exception was not specified in the tariff that PG&E drafted. If, in its claim of deliberate drafting, PG&E seeks to identify a tariff ambiguity and to prevail on its interpretation, the argument must fail. The Commission has held: "It is well-established that ambiguous tariff provisions are to be construed strictly against a utility and any doubt resolved in favor of the customer." (Citations omitted.) (*Carlton Hills School v. SDG&E* [D.82-04-007] (1982) 8 Cal.P.U.C.2d 438, 440.) The Commission has also said, "It is not fair to apply unclear tariff provisions against the ratepayer." (*Complaint of Ellickson v. Gen. Tel. Co. of Calif.* [D.93365] (1981) 6 C.P.U.C.2d 432, 437.)

PG&E claims that the definition of billing error articulated in Resolution G-3372 (specifically identified by PG&E as Findings of Fact Nos. ("FOF") 3, 4, 10 and 14 and related discussion) is inconsistent with the pre-existing tariff language. This claim lacks merit. The argument relies on PG&E's unreasonable claims that there must be an actual bill that is later identified to be in error in order to have a billing error and that if failures to bill and estimated bills were not listed as examples in the definition, they cannot be considered billing errors.

Interpreting the definition of billing error in light of the concepts of "correct" and "incorrect" billing of an account leads to the conclusion that neither failure to issue a bill nor an estimated bill can reasonably be interpreted as correct billing of an account and therefore, they represent billing error. In addition, failures to issue a bill and estimated bills reasonably fall within the types of problems listed in the Rule 17.1(A) examples. The Resolution reasonably interprets the language of the pre-Resolution Rule 17.1. PG&E's arguments regarding interpretation of its tariff do not identify an error in the Resolution.

C. The Resolution is consistent with D.94-07-50.

The Commission applied the D.86-06-035 policy on retroactive billing of residential customers in a 1994 complaint case against PG&E. (*Geraldine Skinner v. Pacific Gas and Electric Co.* [D.94-07-050] (1994) 55 Cal.P.U.C.2d 408.) (*"Skinner.")* In *Skinner*, PG&E had failed to bill a customer for actual electric usage for 12 months. PG&E billed the customer a minimum $5 charge for electricity and billed for gas usage. (*Id.* at p. 409.) The Commission explained, "[t]hus, because of a failure of defendant's account coding and methods to verify usage, the underbilling continued for 12 months." (*Id.* at p. 410.)

The *Skinner* decision relied on D.86-06-035, quoting the following,

> "The utilities' responses indicate that they all have adequate procedures to detect and correct both billing errors and meter errors promptly. That being the case, we see no reason to permit the utilities to backbill for

> undercharges due to meter error or billing error for more than three years. *We believe a three-month limitation period for backbilling residential customers is sufficient in view of the utilities' assertion that they have procedures to detect billing and meter errors promptly.* Because billing for commercial customers is usually more complex and involves larger amounts of money, we will continue to permit backbilling for commercial customers for three years. [Emphasis added.]"

(*Id.*, at p. 411, emphasis in original.) The *Skinne*r decision held, "[p]ursuant to D.86-06-035, defendant has established Rule 17.1(B)2(a) in its tariff. . . . This rule allows defendant to backbill a residential account for a period of three months to correct billing error. Based upon D.86-06-035 and Rule 17.1(B)2(a), defendant may bill complainant for estimated usage during February, March, and April of 1993." (*Id.*)[7]

In *Skinner* the Commission interpreted PG&E's rule 17.1 to be consistent with D.86-06-035 and held that there was a three-month limit on backbilling residential consumers for failure to bill actual usage and for estimating usage. This is consistent with the Resolution's statements regarding the proper interpretation of PG&E's existing tariff language. PG&E's claim that it had no notice of Commission policy lacks merit.

D. Additional points raised by PG&E

In its discussion of interpreting Rule 17.1, PG&E's Rehearing Application includes two paragraphs that briefly touch upon several statements of policy and law, but contain only one allegation of legal error. (Rehearing

[7] A copy of PG&E's tariff Rule 17.1, effective August 12, 1992, appears in Appendix A of D.94-07-050. The definition language of Rule 17.1(A) as reproduced in the Appendix of the *Skinner* decision is substantially the same as the pre-Resolution language cited in the Resolution, except that references to energy service providers were added in 1998. (See also, Advice Letter No. 1716-E, effective January 10, 1998.) The language in Rule 17.1 (B) 2 (a) codifying the three-month backbill limit has remained unchanged.

Application, pp. 6 and 7, and quoted below.) As discussed below, most of the statements in these paragraphs do not "set forth specifically the ground or grounds on which appellant considers the decision to be unlawful," as required by Public Utilities Code section 1732, and are therefore without merit.

PG&E also raises policy arguments that are ambiguous and contradictory regarding retroactive billing. PG&E makes policy statements that appear to address the substance of the Resolution's adopted tariff language. However, the purposes of these statements are unclear. If the policy statements are intended to question the Commission's authority to establish limits on retroactive billing, this would seem to contradict PG&E's statement that, "PG&E's concern with Resolution G-3372 is thus not with its prospective application but with its contradictory implications for the past." (Rehearing Application, p. 1.)

PG&E says:

> "In addition, tariffs must be strictly construed. See *AC Farms Sherwood v. SCE,* [citation omitted] quoting *Utility Audit Co., Inc. v. Southern California Gas Co.*, [citation omitted.] Sections 532 and 453 of the Public Utilities Code have been held to give rise to a "legal duty to backbill." [Citations in footnote.] Public Utilities Code section 532 similarly prohibits the provision of free electricity except as authorized by Commission order or rule. The Commission's general policy – reflected in its decisions – is that a customer receives and benefits from utility usage, the customer must pay for that usage. [Citations in footnote.] As the Commission stated in Duncan v. SCE, [citation omitted,]
>
> 'PU Code Section 532…prohibits the utility from extending any privilege to one customer which is not extended to all others. Thus, if the utility discovers that it has – inadvertently or otherwise – extended the "privilege of free electricity to a customer, that utility is obligated to collect the value of that free electricity, as set forth in the utility's tariffs, from the customer.'

> Resolution G-3372 approved changes to Rule 17.1 explicitly stating that delayed and estimated bills are to be treated as billing error under defined circumstances. The prior tariff contained no such explicit statements. Implying them would contradict the directive that tariffs be strictly construed and the obligation to collect tariffed charges from the customer for utility services rendered to that customer."

(Rehearing Application, p. 6-7, emphasis added.)

1. Tariffs strictly construed

The second underlined sentence in the passage above suggests, but does not actually state, that the Resolution "implies" its interpretation of "billing error" from the pre-Resolution tariff, apparently referring back to the first underlined sentence in the passage. In fact, as discussed earlier, the Resolution's interpretation that failures to bill and estimated bills are billing errors under the previous tariff results from interpreting the actual language of Rule 17.1 "in a reasonable, common-sense manner." Interpreting the language of the pre-Resolution Rule 17.1 reveals that failures to bill and estimated bills are billing errors because they are not correct billing of an account, because they are consistent with the types of problems provided in the examples and because they are not specifically exempted from either the definition in Rule 17.1(A) or from the three month limitation in Rule 17.1(B) 2(a).

PG&E cites two decisions that address strictly construing tariffs. They are *AC Farms Sherwood v. SCE* [D.03-10-089] (2003) ___ Cal.P.U.C.3d ___, 2003 Cal. PUC LEXIS 529 at *7 ("*AC Farms Sherwood*") and *Utility Audit Co., Inc. v. Southern California Gas Co.*, [D.94-05-041] (1994) 54 Cal.P.U.C.2d 480 (*Utility Audit Co.,)* (Rehearing Application, p. 6.) *AC Farms Sherwood* involves an applicant for rehearing who argues that SCE, having applied language from one tariff schedule in a particular way, must apply the same language in another schedule the same way. Citing Public Utilities Code section 532 and

Utility Audit Co., the Commission found: "a utility may not violate its tariffs for one customer even if it has violated them for another." (*A.C Farms Sherwood, supra*, at *7.) In *Utility Audit Co.* the Commission refused to apply an amended tariff retroactively even though the previous tariff did not address the type of facility at issue and the revised tariff did. (*Utility Audit Co., supra,* 54 Cal.P.U.C.2d at p. 488.)

The two decisions cited by PG&E on the strict construction of tariffs are not helpful. The question in those decisions was whether the Commission would authorize flexibility as to how the tariffs were applied to a particular customer. In both cases the Commission decided that the applicable tariff language must be applied to the customer. Nothing in the Resolution is inconsistent with the holdings in these two cases.

2. Allegations regarding legal duty to backbill

In the passage quoted above, PG&E asserts a "legal duty to backbill" based on Public Utilities Code sections 532 and 453. (Rehearing Application, p. 6.) PG&E does not explain how the "legal duty to backbill" relates to the Resolution, whether PG&E believes the duty to backbill affects the Commission's authority to set limits on retroactive billing, or whether PG&E believes there is an error in the Resolution related to its "legal duty to backbill." PG&E's comments on this point do not allege legal error or set forth specifically grounds on which PG&E considers the Resolution to be unlawful. Therefore, this topic does not require further analysis.

Continuing with the quoted passage from above, PG&E states that Public Utilities Codes section 532 prohibits extending a privilege of free electricity to one customer that is not extended to all customers and requires a utility to "collect the value of that free electricity." This argument has no merit. PG&E fails to demonstrate how the Resolution has violated this statutory section. Accordingly, no further analysis is necessary.

E. PG&E's claim that the resolution adopts "significant substantive" changes to PG&E's tariffs does not identify legal error.

PG&E itemizes the modifications required by the Resolution and notes the addition of "over 100 words to PG&E's tariffs," arguing that these are not "minor word changes," but "new requirements." (Rehearing Application, p. 9.) As noted previously, PG&E does not dispute the Commission's authority to require the modifications, but challenges the Resolution's statements that its tariff changes are consistent with existing policy and tariffs. Counting the number of changes and the number of added words is not a substantive analysis of the Resolution and as an allegation of error the argument has no merit.

The Resolution's tariff language provides more detail than the pre-Resolution Rule 17.1 and specifically addresses the categories of failure to issue a bill and estimated bills. The language provides clarification, rather than a policy change in the existing tariffs. PG&E incorrectly alleges these are "significant substantive" changes. As discussed previously, the Resolution clarifies the existing tariffs and "simply reflect[s] the proper interpretation of existing tariffs." (Resolution, p. 16.)

It is clear from PG&E's summary statement on this topic that the allegation about "significant substantive changes" is merely another way of claiming that the Resolution's definition of billing error is new. (Rehearing Application, p.10) As discussed elsewhere in this order, the argument has no merit.

F. Allegation that Resolution is inconsistent with previous version of PG&E's tariff Rule 9(C) does not identify legal error.

PG&E claims that, by including estimated bills within the definition of billing error, the Resolution "is entirely at odds with the objective of the 1998 Rule 9 revision" to accommodate direct access, as proposed in its December 1,

1997 advice letter 1716-E/1716-E-A. (Rehearing Application, p. 11, emphasis added.). The advice letter language that PG&E cites includes:

> "[t]he language in this section is also modified to assure that estimated consumption is considered final for both billing and settlement purposes. This change complies with the intent of the Commission that both ESPs and utilities bill and settle with customers based on consistent usage data. The existing provisions of Rule 9 would not allow this since the utility would be required to perform adjustments to previous estimates."

(Rehearing Application, p. 10, citing, Advice Letter 1716-E/1716-E-A (December 1, 1997).)

We note, first, that the actual tariff language does not contain the above-cited advice letter language. Rule 9(C) says,

> "If, because of unusual conditions or for reasons beyond the meter reading entity's control, the customer's meter cannot be read on the scheduled reading date, or if for any reason accurate usage data are not available, PG&E will bill the customer for estimated consumption during the billing period. Estimated consumption for this purpose will be calculated considering the customer's prior usage, PG&E's experience with other customers of the same class in that area, and the general characteristics of the customer's operations."

(Resolution, p. 3.) On its face, there is no basis for concluding that estimated consumption would, pursuant to Rule 9 (C), never be corrected with actual consumption.

TURN observes, "neither the resulting tariff language nor the underlying purpose served by the changed language, suggests that billing errors from use of an estimated bill were to be ignored forever, . . . " (TURN Response, p. 15.) For purposes of this application for rehearing, it is noted that the language of the previous Rule 9 (C) does not contradict the revised language adopted in

Resolution G-3372. In fact, PG&E claims only that the Resolution is at odds with the objective of the rule; not with the rule itself. PG&E's argument regarding Rule 9(C) does not reveal an error in the Resolution.

H. PG&E's claimed reliance on Commission staff.

1. PG&E's assertion that it relied on Consumer Affairs Branch does not state grounds that show the Resolution to be unlawful or erroneous.

PG&E argues that the Commission cannot ignore staff guidance which it failed to rescind "for the past four years." (Rehearing Application, p. 14.) PG&E attaches to its Rehearing Application 14 letters from the Commission's Consumer Affairs Branch (CAB.) The letters state some policy views that appear to be inconsistent with official Commission policy as stated in formal Commission decisions. PG&E accepts the Resolution G-3372 statements, "advice provided by staff is not binding upon the Commission," (Rehearing Application, p. 13, citing Resolution G-3372, p. 10, n. 1) and, the "Commission has the authority to rescind staff disposition of complaints." (Rehearing Application, p. 13, citing Resolution G-3372, p.17.) In fact, PG&E characterizes the above Commission statements as "axiomatic." (Rehearing Application, p. 14.)

Yet, in spite of its acknowledgement that the Commission is not bound by staff statements, the Rehearing Application contains arguments that appear to contradict this position. PG&E argues: "the Commission cannot simply ignore the guidance provided by its designated staff" and also, "[b]y contradicting this well-established guidance, Resolution G-3372 arbitrarily and capriciously has changed – not affirmed – existing Commission policy and requirements." (Rehearing Application, p. 14.)

We, and not the staff, establish the regulatory law that the utilities must follow. The CAB letters do not constitute grounds for finding the Resolution to be unlawful or erroneous, nor does PG&E offer legal authority in support of its argument on this point. PG&E knows very well that the informal opinions of the

Staff cannot bind the Commission. PG&E's discussion of CAB letters does not identify error in the Resolution.

2. PG&E's claim that it relied on the guidance of Commission staff and that this reliance was reasonable does not state grounds which establish that the Resolution is unlawful or erroneous.

PG&E also argues, regarding the significance of mistaken staff statements, "it is reasonable for utilities to follow the directions of Commission staff." (Rehearing Application, p. 14, citing *Application of Metromedia Fiber Network Services, Inc.* [D.04-04-068] (2004) ___ Cal.P.U.C.3d ___, 2004 Cal. PUC LEXIS at *35.) *Metromedia* is a decision in an adjudicatory proceeding in which evidence of incorrect staff advice and inconsistent Commission practice was considered as mitigating in discussing penalties. This type of mitigation argument has no place in an Application for Rehearing regarding an advice letter where no violations or penalties are at issue. Because PG&E's past behavior is not at issue in the resolution, arguments in defense of its behavior are not relevant. Arguments in support of PG&E's conduct do not address whether there is an error in the Resolution and, therefore, have no merit.

H. Retroactivity and Due Process.

PG&E raises a speculative claim of possible retroactive effect based on its threshold premise that the Resolution states a new definition of billing error. PG&E alleges that the Resolution "contains language that could be implied to give retroactive effect to the Commission's new definition of 'billing error'." (Rehearing Application, p.16.) However, PG&E does not identify exactly which language raises the implication. PG&E also raises a due process issue as related to the speculative possibility of retroactive application. (Rehearing Application, p. 18.)

In its comments on the draft Resolution PG&E claimed that the draft improperly adjudicated "the legality of PG&E's billing practices." (Response to revised draft Resolution G-3372, supra, p. 1.) The Resolution responds to the due process/retroactivity concerns PG&E raised in its comments on the draft resolution. As noted above, the Resolution says, "[t]he Commission is not attempting to adjudicate PG&E's past behavior in this resolution," and, "PG&E shall be free in any future Commission proceeding to litigate its past behavior." (Resolution, p. 17.)

PG&E now claims that: "[w]hile the Commission removed some troubling language from the draft resolution, the final resolution nevertheless contains language that could be implied to give retroactive effect." (Rehearing Application, p. 16.) Although PG&E does not specify which language it is referring to, we believe the Resolution does contain some unnecessary factual information regarding customer complaints. While these references do not constitute legal error, especially in light of the clarification we have already provided, we will remove them from the revised Resolution.

1. Because the resolution does not adopt a new definition of "billing error" there can be no retroactive effect.

Based on its assertion that the Resolution states a "new" definition of billing error, PG&E states, "[t]he theory against retroactive application of a statute is that the parties affected have no notice of the new law affecting past conduct. PG&E goes on to argue that based on the letters and guidance provided by the Commission CAB staff in the past, PG&E had every reason to believe that delayed and estimated bills did **not** fall within the definition of "billing error." (Rehearing Application, p. 18, emphasis in original.) Thus, PG&E argues it had no notice that "delayed" and "estimated" bills constituted "billing errors."

This claim does not state an error in the Resolution for two reasons. First, contrary to PG&E's claim, Resolution G-3372 does not state a new policy; therefore, there can be no retroactive application of a new policy. As discussed

above, the Resolution adopts clarifications that, "simply reflect the proper interpretation of existing tariffs." (Resolution, p. 16.) The three-month limitation on backbilling of residential customers for billing error was stated in 1986 (see *Retroactive BillingDecision* [D.86-06-035], *supra*, 21 Cal P.U.C.2d at p. 278.) and was incorporated into PG&E's tariff along with a definition and examples of what constitutes billing error. Furthermore, in the 1994 *Skinner* decision regarding a PG&E complaint case, the Commission applied the D.86-06-035 three-month limitation on residential backbilling for both failure to bill actual usage and estimated billing. (*Skinner, supra*, 55 Cal.P.U.C.2d at p. 408.)

Second, PG&E's claim is contrary to the Resolution, which states that it is not attempting to adjudicate PG&E's past behavior. (Resolution G-3372, p. 17.) Accordingly, we will not prejudge issues related to PG&E's past behavior. PG&E's retroactivity allegation does not identify an error and, therefore, does not warrant a grant of rehearing.

2. Due Process

In response to PG&E's comments on the Draft Resolution, the Resolution says, "PG&E states that it was not afforded due process with the opportunity for adjudicatory hearings on these matters." (Resolution, p. 17.) The Resolution responds to this concern, saying: "[t]he Commission is not attempting to adjudicate PG&E's past behavior in this resolution," and, "PG&E shall be free in any future Commission proceeding to litigate its past behavior." (Resolution, p. 17.)

PG&E claims in its rehearing application that it had no notice of the Commission's alleged change in the tariff involving "billing errors." It argues that based on the letters and guidance provided by the Commission CAB staff in the past, PG&E had every reason to believe that delayed and estimated bills did not fall within the definition of "billing error." (Rehearing Application, p. 18.) This argument has no merit.

As previously discussed, the Resolution did not adopt a change in existing Commission policy. It provided clarification in response to PG&E's advice letter. Further, PG&E had notice that the Commission would have to consider the correct interpretation of the term "billing error" in the tariff. This issue of interpretation was an essential part of the Commission's consideration of the advice letter filing. Further, PG&E had an opportunity, which it took, to file comments on this issue. (See, e.g., PG&E's Response to revised draft Resolution G-3372, dated December 30, 2004.)

In its Rehearing Application, PG&E argues, "retroactive enforcement of a new administrative rule is not legally permissible and would violate PG&E's due process rights." (Rehearing Application, p. 18.) PG&E's due process concern, like its retroactivity concern, focuses on whether it could "be found in violation of its then-existing tariffs based on the Commission's new definition without prior notice and an opportunity for formal adjudicatory hearings . . . ." (Rehearing Application, p. 18.) This concern has no merit, simply because the Commission has not adopted a new administrative rule. Any "enforcement" based on this clarification would constitute the enforcement of an existing tariff.

The Resolution also says: "[t]he Commission may review whether PG&E violated its tariffs if it conducts an investigation of PG&E's past billing practices as requested by TURN in A.02-11-017, et. al." (Resolution, p. 17.) The Assigned Commissioner in A.02-11-017 and I.03-01-012 granted TURN's motion for an investigation into PG&E's billing and collection practices. (*Assigned Commission Ruling* ("*ACR*") of February 25, 2005.) On May 26, 2005 the Assigned Commissioner issued a scoping memo establishing scope, schedule and procedures for Phase II of I.03-01-012. The schedule includes prepared and responsive testimony and evidentiary hearings, thereby ensuring that PG&E will receive due process in regard to the subject matter of the investigation.

Given that PG&E filed comments on the Draft Resolution, that no adjudicatory ruling was made in the Resolution and that a hearing has been

scheduled in the current adjudicatory investigation, there is no merit in PG&E's arguments that it has been or may be deprived of due process.

I. Additional Clarification

1. Clarify the phrase, "consistent with existing CPUC policy, tariffs, and requirements, including the requirements of D.86-06-035."

PG&E has challenged the general accuracy of the statement, "consistent with existing CPUC policy, tariffs, and requirements, including the requirements of D.86-06-035," which we have used throughout the Resolution. (See, e.g., Rehearing Application, p. 4 and Resolution, pp. 2, 9 and 16.) PG&E has not challenged the specific language. However, upon review, we believe it would be helpful to clarify the Resolution by modifying this phrase. In the revised Resolution, attached as Appendix A to today's decision, we will modify the phrase to state, "consistent with existing CPUC policy and requirements as set forth in Decision 86-06-035 and with existing PG&E tariffs." This revised language more correctly states the position that we intended to capture in the original phrase and is more in line with our analysis in today's decision.

2. Terminology referring to "failure to issue a bill" should be consistent throughout the Resolution.

As noted above, PG&E uses inconsistent terminology in its Advice Letter. (See footnotes 1 & 2, *supra.)* The Advice letter refers to both "failure to issue a bill" and "failure to deliver a bill." (Compare Advice Letter, pp. 1 & 3 and Attachment 1, Sheets No. 22745-G and 22312-E containing replacement tariff sheets for Rule 17.1(A) (emphasis added).) Other documents refer to "delayed" bills. (See, e.g., Application for Rehearing.) The Resolution correctly notes that, PG&E's proposed change to Rule 17.1 is, "the failure to issue a bill constitutes billing error." (Resolution, p. 9, (emphasis added).) However, the Resolution goes on to approve tariff language saying billing error shall also include, "failure

to deliver a. . . bill. . . .” (Resolution, p. 9.) The inconsistent usage appears to be non-substantive, but potentially confusing. The Resolution also refers to “delayed” bills (p. 10) and orders PG&E to submit a report regarding “delayed and estimated bills.” (Resolution, p. 15 & 27.)

The phrase “delayed” bill was not proposed in the Advice Letter, although PG&E used “delay” and its dictionary definition to support its allegation of error in the Resolution. (Rehearing Application, p. 5.) It appears from the record that the parties have treated the interchangeable use of the phrases as non-substantive. For the sake of internal consistency, as well as consistency with the Advice Letter, the Resolution will be revised to refer consistently to “failure to issue” bills except where the context requires otherwise.[8]

Therefore, **IT IS ORDERED** that:

1. Resolution G-3372 is modified in the manner set forth below. Attached is Appendix A which is a Revised Resolution G-3372 reflecting the following changes:

a. The third summary paragraph on page 2. This statement is modified to read as follows:

> “The tariff changes we authorize today are consistent with existing CPUC policy and requirements as set forth in Decision (D.)86-06-035 and with existing PG&E tariffs.”

b. The second heading on page 5 is modified to read as follows:

> **“The Commission staff and PG&E have been addressing the number of**

[8] We will not modify the language in our requirement that PG&E file a report regarding “delayed and estimated bills over the past five years….” (Resolution, Finding of Fact No. 11, p. 25, Ordering Paragraph No. 2, p. 27.) The report was due within 15 days of the Resolution and we do not intend in today’s decision to alter any aspect of that requirement.

complaints from PG&E customers regarding failures to issue bills ("delayed") and estimated bills; some related to PG&E's new billing system."

c. The second full paragraph on page 5 is modified to read as follows:

"Correspondence provided in PG&E's response to TURN's protest to the advice letter reveals that Commission staff has been concerned about the number of PG&E customers receiving 'delayed' or estimated bills. (See *Response to TURN's Protest to Advice Letter 2581-G/2568-E – Modification to Rule 17.1, 17.2 and proposed 17.3*, November 12, 2004, Attached letters from Thomas E. Bottorft of PG&E (October 22, 2004,) Stephen Larson of the Commission (October 12, 2004,) and Brian K. Cherry of PG&E (November 10, 2004.)"

d. The third full paragraph on page 5 is modified to read as follows:

"According to the correspondence, staff believed PG&E issued a relatively large number of delayed bills in 2003. "Delayed" in this context refers to a bill that is issued more than 60 days after gas or electric usage occurred. PG&E informed Energy Division that some "delayed" bills in 2003 were related to implementation of PG&E's new billing system."

e. The fourth full paragraph on page 5 is deleted.

f. The fifth paragraph on page 5, continuing onto page 6, is deleted.

g. The first sentence in the first full paragraph on page 6 is modified to read as follows:

"By letter to PG&E dated October 12, 2004 the Commission's Executive Director noted numerous customer complaints related to delayed and estimated bills."

h. The first heading in the "DISCUSSION" section on page 8 is modified to read as follows:

"The Commission should act on PG&E's AL 2581-G/2568-E to ensure that back billing is consistent with the correct interpretation of PG&E's tariff and applicable Commission requirements."

i. The second sentence in the first paragraph of the **DISCUSSION** section on page 8, following the above heading, is deleted.

j. The second sentence in the first heading on page 9 is modified to read as follows:

"This change is consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

k. The tariff language adopted in the first full paragraph on page 9, after the above heading is modified to read as follows:

"Billing error shall also include failure to issue a gas, electric, or combined commodity bill, actual or estimated, in a timely manner in accordance with Rule 9A."

l. The sentence immediately following the above adopted tariff language on page 9 is modified to read as follows:

"The change to the tariff cited above is consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs.**"**

m. The heading in the center of page 10 is modified to read as follows:

> **"Billing error occurs and Rule 17.1 applies when failure to issue bills or estimated bills are due to circumstances involving changes to a billing system."**

n. The third paragraph on page 10, following the above heading, and the last paragraph on page 10 continuing onto page 11 and the first full paragraph on page 11 are deleted.

o. The second full paragraph on page 11 is modified to read as follows:

> "In instances where bills are not issued or are estimated due to problems related to an electronic billing system, the policy underlying Rule 17.1 would apply. Problems with the implementation of PG&E's new billing system should be treated as billing errors. Such problems are not circumstances in which PG&E may issue estimated bills indefinitely, i.e., in cases of a natural or man-made disaster, or inaccessible roads, the customer, the customer's agent, other occupant, animal or physical condition of the property preventing access to PG&E's facilities on the customer's premise, or other causes within control of the customer. The customers in situations where bills are not issued or are estimated due to problems related to an electronic billing system should be back billed only for a period of 3 months in accordance with Rule 17.1.B.a."

p. The first sentence in the third full paragraph on page 11 is deleted.

q. The third paragraph (one sentence) after the heading on page 12 is modified to read as follows:

> **"**These tariff changes are consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

r. The second heading on page 13 is modified to read as follows:

> "PG&E's proposed changes to Rule 17.2 clarifying use of PG&E service without compensation are approved with modifications; these tariff changes are consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

s. The sentence following the revised gas Rule 17.2.A.5 in the second paragraph on page 14 is modified to read as follows:

> "The tariff changes that we require are consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

t. The last sentence in the first paragraph after the heading in the center of page 14 is deleted.

u. The sentence following the revised tariff language adopted in the first paragraph on page 15 is modified to read as follows:

> "This tariff change is consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

v. The first sentence in the first full paragraph on page 16 is modified to read as follows:

> "The tariff changes we authorize in this resolution are consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

w. The second sentence in the first full paragraph on page 17 is modified to read as follows:

> "Accordingly, any references to complaints about PG&E's behavior are intended solely for the purpose of providing background and not for the purpose of investigating PG&E's past behavior."

x. The third sentence in the last paragraph on page 19 is deleted.

y. The last sentence in the first paragraph on page 21 is deleted.

z. The second sentence of Finding of Fact No. 3 on page 24 is modified to read as follows:

> "This is consistent with existing CPUC policy and requirements as set forth in D. 86-06-035 and with existing PG&E tariffs."

aa. The second sentence of Finding of Fact No. 4 on page 24 is modified to read as follows:

> "This is consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

bb. Finding of Fact No. 10 on page 25 is modified to read as follows:

> "The tariff changes to gas and electric Rules 9C, 17, 17.1, and 17.2 required by this resolution are consistent with existing CPUC policy and requirements as set forth in D.86-06-035 and with existing PG&E tariffs."

2. Rehearing of Resolution G-3372, as modified, is denied.

3. Application (A.) 05-02-022 is closed.

This order is effective today.

Dated September 22, 2005, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
DIAN M. GRUENEICH
JOHN A. BOHN
Commissioners

APPENDIX A